In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1434

ROBERT N. DEVORE, M.D., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 15–25) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1970. The petition for a writ of certiorari was filed on April 16, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly handled the defense of entrapment.

384-931-70

2. Whether the trial court was required to reveal the contents of the pre-sentence report.

3. Whether the introduction of a recording of a conversation between petitioner and a government undercover agent was proper.

STATEMENT

After a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted on four counts of selling and delivering depressant and stimulant drugs in violation of 21 U.S.C. (Supp. IV) 331(q)(2). On April 24, 1969, he was sentenced to four years imprisonment and fined $22,000. The court of appeals affirmed.

An agent for the Bureau of Narcotics and Dangerous Drugs testified that, in the latter part of September, 1967, and twice in August, 1968, the Bureau received information concerning the activities of petitioner (Tr. 101). In response to these reports, Agent Norman C. Shumard was assigned to investigate.

Shumard went to petitioner's office on September 26, 1968. Introducing himself as Norman Shaw, a truck driver, he asked petitioner for some "stay awakes" (slang for amphetamine tablets) to enable him to keep alert on a long trip he was making (Tr. 114). Petitioner, who did not conduct a physical examination of the agent or ask about his health, agreed to give the agent a few pills. He refused, however, to supply him with a large quantity, since he feared the government would check his records. Shumard said this was too bad because he could handle a large supply of the pills and was willing to pay up to $100 per

thousand (Tr. 114–115). At this point, according to Shumard, petitioner asked him how much he could purchase. He showed the agent a drug catalogue and told him he could supply the agent with 10,000 Dexedrine pills for $1,000. Shumard accepted the offer and left (Tr. 115). Petitioner ordered the drugs the next day (Tr. 290).

On October 10, 1968, petitioner told the agent that the shipment would not arrive before October 15. Shumard then placed an order for "sleepers" (barbiturates) (Tr. 116–117). On the evening of October 15th, Agent Shumard returned to petitioner's office. Petitioner did not have the barbiturates but gave the agent 10,000 Dexedrine pills in exchange for $850, the balance to be paid at their next meeting (Tr. 120-122).

On October 17, 1968, Shumard gave petitioner the remaining $150 and purchased unlabeled bottles of Nembutal tablets for $100. He also agreed to buy an additional 10,000 Dexedrine pills plus 2,000 Dexamyl and 2,000 Nembutal tablets (Tr. 124–128). In answer to petitioner's inquiry, Shumard told him he would purchase up to 25,000 pills.

On November 4, 1968, Shumard told petitioner that he could dispose of 200,000 pills (Tr. 132). Petitioner agreed to supply him with up to 45,000 pills per month at $75 per thousand. Four days later, petitioner delivered 14,000 tablets to the agent at a cost of $1,050 (Tr. 145). Shumard discovered that this shipment was short by approximately 2,000 pills and returned, on November 19, 1968, to discuss the shortage (Tr. 148). During this meeting the agent carried a concealed Kell radio-transmitter by means of which

the entire conversation was recorded. The tape was admitted at trial to corroborate Shumard's testimony.

The final delivery occurred on December 17, 1968, when Shumard went to petitioner's office and received 10,000 tablets of Dexedrine. After the transaction was concluded, petitioner was placed under arrest (Tr. 151).

According to petitioner's testimony, he refused to sell or give any drugs to Agent Shumard on his first visit, September 26, 1968. Later that evening, he telephoned the police about the incident and was told to obtain whatever information he could (Tr. 282–286). The next day, he ordered the drugs requested by the agent to set a trap for him (Tr. 290). He testified that his continued contact with the agent was solely for the purpose of helping the police (Tr. 297, 305, 318). Petitioner admitted that he never attempted to contact or otherwise inform the police after his initial phone call (Tr. 333), even when a deputy sheriff came to his office as a patient (Tr. 336–337).

The trial court submitted the issue of entrapment to the jury (Tr. 442) under instructions which are not questioned.

ARGUMENT

1. In the court of appeals, petitioner argued that, even though he raised the defense of entrapment, the government should not have been allowed to use hearsay testimony on the issue of predisposition to commit the offense. The majority opinion of the court below expressed the view that the evidence, which showed merely an offer to buy, did not even raise an

issue of entrapment, and that "the government need not have reasonable grounds to suspect illegal conduct before offering the opportunity to commit a crime" (Pet. App. 17). All three members of the panel agreed that on the facts, the jury could properly reject the defense of entrapment.

Much of the petition for a writ of certiorari relates to that part of the opinion below which suggests that the evidence did not even raise an issue for the jury. Since, here, the issue was in fact submitted to the jury, this would not be an appropriate case in which to resolve such subtle differences as exist among the circuits as to the degree of solicitation by the government which is sufficient to raise an issue for the jury to resolve.

Petitioner's contention that the trial court allowed improper evidence to come before the jury on the issue of entrapment is without merit. Agent Shumard testified that he was assigned to investigate petitioner because on one occasion in September 1967 and on two occasions in August 1968, the Bureau of Narcotics and Dangerous Drugs received reports concerning petitioner's activities (Tr. 101–102). The testimony was limited to the fact that information had been received, without revelation of either the source or the contents of the reports. The fact that these reports had been received merely furnished the background for the agent's testimony as to his dealings with petitioner. The government based its essential evidence refuting entrapment on petitioner's readiness to violate the law and the inconsistencies in his own testimony.

Petitioner also claims that the government deliberately permitted one of its witnesses to testify, inaccurately, that petitioner had previously been under criminal investigation. The witness, who was the custodian of records of the Interstate Drug Exchange, testified on direct concerning information sent to the Bureau of Narcotics after the date of the offense charged. On cross-examination he was asked if there had been other inquiries and if the records for 1967 and 1968 were available. He replied that they were but that he had been asked to check only for the period from September to December 1968 (Tr. 239–240). Defense counsel also asked whether Interstate had received a request from a company in Atlanta for an accounting of drugs sold by petitioner. The witness testified that the request did come in and was answered but that he himself was not connected with it (Tr. 244). There is nothing in the replies of the witness to imply that this investigation had dealt with the illegal sale of drugs. Furthermore, to the extent that the agent's testimony did indirectly suggest that there might have been prior investigation of illegal activity, the testimony was elicited at the instance of defense counsel.

2. Petitioner contends that the trial court erred in refusing to disclose information contained in his probation report. Under Rule 32(c)(2), F.R. Crim. P., the disclosure of any or all of the material in a presentence report rests within the discretion of the trial judge. See *United States* v. *Gross,* 416 F. 2d 1205 (C.A. 8); *United States* v. *Crutcher,* 405 F. 2d

239 (C.A. 2), certiorari denied, 394 U.S. 908. Since the trial judge announced, prior to sentencing, that he based sentence solely upon the evidence at trial and not on the information in the probation report (Tr. 35i), such refusal did not constitute an abuse of discretion.[1]

3. As noted in the statement on November 19, 1968, agent Shumard carried a Kell radio-transmitter, by means of which his conversation with petitioner was recorded. The tape was played to the jury during trial to corroborate Shumard. The admissibility of the use of a tape obtained by one party to a conversation was upheld in *Lopez* v. *United States,* 373 U.S. 427. In *White* v. *United States,* No. 46, this Term, restored to the calendar for reargument, this Court is considering the admissibility of evidence obtained through carrying of electronic equipment by one of the parties to a conversation. In *White,* the informant who carried the device was not available to testify, whereas here the tape merely corroborated the testimony of the witness. Nevertheless, the Court

[1] Petitioner believed that the case of *Waller* v. *Florida,* No. 24, this Term, which had not yet been decided at the time petitioner filed his brief, had a bearing on this issue. The decision rendered on April 6, 1970, does not deal with disclosure of pre-sentence reports.

may wish to defer action on this petition pending decision in *White*.

Respectfully submitted.

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